85-1262

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RONALD A. ZUMBRUN
SAM KAZMAN*
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

The issues raised in this case involve the Origination Clause of the United States Constitution, which states:

> "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, cl. 1.

The following questions are presented for review:

1. Whether the meaning of the term "bills for raising revenue" is a justiciable issue; in particular, given conflicting interpretations of that term by Congress, may a court refuse to independently determine whether the term refers only to bills that increase revenue, or instead covers all revenue-related bills?

2. Whether the enactment of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982), violates the Origination Clause in that it originated in the House as a bill to *reduce* revenues but had its entire text, except for its bill number, removed by the Senate, which substituted in its place the major tax increase which was subsequently enacted into law.

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Texas Association of Concerned Taxpayers (TACT) respectfully petitions this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 163 (1985) and is reprinted in the appendix to

this petition (App.) at A1. The opinion of the United States District Court is unreported; it is reprinted in the appendix at A11.

JURISDICTION

The decision of the Court of Appeals was issued on September 30, 1985. A timely petition for rehearing en banc was denied by the court on October 29, 1985. App. at A15. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the validity of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), under the Origination Clause of the United States Constitution, Art. I, § 7, cl. 1. The Origination Clause states:

> "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, cl. 1.

The provision of TEFRA which imposed the particular tax at issue in this case is Section 282, 96 Stat. 568, codified at 26 U.S.C. § 4251, reprinted at App. A17.

STATEMENT OF THE CASE

This case began as a tax refund suit for the recovery of federal telephone excise taxes paid by TACT in 1983. These taxes were imposed under 26 U.S.C. § 4251. Prior to TEFRA's enactment, the tax rate was one percent of the taxpayer's telephone bill during the time period at issue, and the tax was to expire entirely after 1984. However, Section 282 of TEFRA tripled the amount of the tax and extended its life through 1985.

The sole issue both below and in this petition is whether TEFRA was validly enacted by Congress in light of the Origination Clause. Because that clause focuses on the initiation and enactment of revenue bills, a review of TEFRA's legislative history is essential to this case.

A. Background of the Tax Equity and Fiscal Responsibility Act of 1982

TEFRA originated in the House of Representatives as H.R. 4961, 97th Cong., 1st Sess. (1981). When it was first passed by the House on December 15, 1981, H.R. 4961 "was intended to reduce taxes." Decision below, 772 F.2d at 164, App. at A2.[1] As the committee report which accompanied the bill made clear, each of its revenue provisions would have reduced tax receipts, with total revenue reductions expected to range from $69 million in fiscal year (FY) 1982 to over $300 million in FY 1986. *See* H.R. Rep. No. 404, 97th Cong., 1st Sess. (1981), at 9, 19, 22, 24, 26, 38, 40-41.

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[1] *See also Armstrong v. United States*, 759 F.2d 1378, 1380-81 (9th Cir. 1985) ("in its original version it would have reduced total tax revenues by a billion dollars between 1982 and 1986").

H.R. 4961 then went to the Senate, where the Finance Committee proceeded to strike out the entire text of the bill and replace it with the largest tax increase in United States history.[2] When this new version of H.R. 4961 was reported out by the committee on July 12, 1982, it contained over 100 changes to the Tax Code affecting a vast array of revenue items. *See* S. Rep. No. 494, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 781. Instead of the tax cut which left the House, H.R. 4961 was now a bill which would *increase* tax revenues by over $218 billion through FY 1987. *Id.* at vol. 1, p. 101, 1982 U.S. Code Cong. & Ad. News 869.

H.R. 4961 was subsequently passed by the Senate on July 23, 1982, in a form largely unchanged from that which the Senate committee had produced. 128 Cong. Rec. S9046 (daily ed. July 22, 1982). In contrast to the 31-page bill which the Senate had originally received from the House, the version it sent back was, as one congressman put it, "a foot and a half thick." 128 Cong. Rec. H4781 col. 2 (daily ed. July 28, 1982) (Rep. Rousselot). As enacted, TEFRA occupies nearly 400 pages in Statutes at Large. *See* 96 Stat. 324-707.

When the Senate version of H.R. 4961 was received back in the House, the Chairman of the House Ways and Means Committee took what he admitted to be the unusual step of moving to proceed immediately to conference with the bill rather than have the House committee attempt to write its own tax increase. This was based on his concern

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[2] The Senate did retain the very first sentence of the bill, the enacting clause ("Be it enacted . . . ."), the contents of which is prescribed by law for all acts of Congress. *See* 1 U.S.C. § 101.

that, with upcoming elections only several months off, the House simply would refuse to propose a tax increase of its own:

> "This is an unusual procedural step to take, Mr. Speaker, and, as chairman of the Committee on Ways and Means, where all revenue-raising measures must originate, I have deep personal misgivings in offering this motion.
>
> "But, while this may seem a somewhat extraordinary procedure for House consideration of a major revenue bill, the severe economic distress and volatile political environment at this moment, in the judgment of the Committee, dictate that we travel this route.
>
> * * * *
>
> "[T]here appears to be widespread fear that any attempt to craft a tax increase bill in the House would lead to political chaos, severely reducing the chances of its passage. Moreover, the August 1 deadline for reporting a revenue package is fast approaching." 128 Cong. Rec. H4777-78 (daily ed. July 28, 1982) (Rep. Rostenkowski).

This conviction that the House simply would not originate its own tax increase was echoed by numerous other supporters of the bypass motion during the extensive debate which followed regarding the procedure's constitutionality. Representative Conable: "This procedure for going to conference is highly unusual. . . . The only way that we are going to get a tax bill is through this procedure. . . . Neither time nor the majority of this body will allow us to follow another course." *Id.* at H4780 col. 1. Representative Frenzel: "If we use the regular procedure, there is no guarantee that any bill will ever pass. As near as I can tell neither the majority, nor minority has either

a bill, or a program." *Id.* at H4782 col. 3. Representative Michel: "I recognize that the Senate bill is not perfect, but it is highly unlikely that our House Ways and Means Committee action [*sic*] on its own would report a bill that could pass this House." *Id.* at H4785 col. 2. Representative Shannon: "[T]he basic reality is that many of these people just are not going to vote for any tax bill this year. . . . You are concerned about what is going to happen in November." *Id.* at H4784 cols. 1-2.

Opponents of the bypass motion challenged not only its validity but also the fact that it would deny House members an opportunity to consider the bill either on the floor or even in committee, notwithstanding that hardly anyone in the House had had a chance to study it. Representative Rousselot stated:

> "We have not touched this bill, very few know what is contained therein. We have not looked at it. It was sent back a few minutes ago. It is a foot and a half thick. Now the original bill went over—look at it here in my hand—31 pages." 128 Cong. Rec. H4781 col. 2 (daily ed. July 28, 1982).

Representative Martin complained about "the rush by which they want to grease this bill through the House of Representatives before anybody is alert to what is in it. The 107 changes [to the Tax Code] are about to zip through here like greased lightning." *Id.* at H4783 col. 1.

The opponents of the bypass motion, whom one congressman castigated as "constitutional Christians" who "wanted to be saved in this constitutional fight" (*id.* at H4780 col. 3 (Rep. Pickle)), were not successful. Their resolution challenging the motion's validity was tabled and, by the narrow vote of 208-197, the House

decided to proceed directly to conference on the Senate's version of H.R. 4961. *See id.* at H4776-88.[3]

The conference committee version of H.R. 4961, closely resembling the Senate version, was reported on August 17, 1982. 128 Cong. Rec. H6167 (daily ed. Aug. 17, 1982). It sparked renewed debate in the House over its constitutionality, with the Chairman repeating his claim that "[t]he path we chose was the only way to get a tax bill to the House floor . . . ." *Id.* at H6555 col. 3 (daily ed. Aug. 19, 1982). The House adopted a closed rule for consideration of the conference bill—that is, it would have to be considered as a whole, with no amendments and with no separate votes on individual provisions. *Id.* at H6547-55. The House and Senate both subsequently approved the conference bill by close votes: 226-207 in the House, 52-47 in the Senate. *Id.* at H6635, S10945. TEFRA was signed into law without comment by the President on September 3, 1982.

B. Procedural History of the Case and the Decision Below

TACT filed its suit in May, 1984, in federal District Court (W.D. Texas) as a tax refund action under 28 U.S.C. § 1346(a), seeking the recovery of telephone excise taxes which it had paid as an association.

TACT's primary claim below, and the sole issue which it presents to this Court, involves the meaning of the term

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[3] This "action meant that the House—including the tax-writing Ways and Means Committee—would have little hand in shaping the legislation. It was a chore many election-minded House members were not sorry to miss . . . ." 1982 *Cong. Q. Almanac* at 37.

"bills for raising revenue" in the Origination Clause. As both the Fifth Circuit and other courts have recognized, if that term refers only to bills which *increase* taxes, as opposed to all revenue-related bills, then TEFRA is invalid—it did not originate in the House as a bill for raising revenue, and its transformation into such a bill by the Senate would be unconstitutional. 772 F.2d at 165; *see also Moore v. United States House of Representatives*, 733 F.2d 946, 949 (D.C. Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 779 (1985). By the same token, for example, if a House bill to establish Father's Day were turned into a tax increase by the Senate, that too would violate the clause since the original House measure would not have been a bill to raise revenue.

The District Court dismissed TACT's suit, relying on decisions in other circuits which upheld TEFRA's validity *after* reaching the merits of Origination Clause challenges. App. at A12. The Fifth Circuit panel affirmed, but on totally different grounds. It "decline[d] to follow" the rulings of those other courts, express and implied, that the meaning of the Origination Clause is justiciable. 772 F.2d at 167, App. at A8. To the contrary, it held that, in light of Congress's own interpretation of that provision, TACT's suit "poses a nonjusticiable political question." *Id.*, App. at A9. As a result not a single one of the arguments presented by TACT on the meaning of the Origination Clause was considered by the court.[4]

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[4] TACT also raised the secondary issue of whether, *assuming* that TEFRA originally was a revenue-raising bill, the Senate exceeded the scope of permissible amendment when it removed the bill's entire text. The Fifth Circuit upheld the Senate's action on the basis of *Flint v. Stone Tracy Company*, 220 U.S. 107 (1911). 772 F.2d at 168, App. at A10. TACT does not raise this issue before this Court.

As is shown below, the Court of Appeals was simply wrong in assuming that there is some established congressional interpretation of the Origination Clause as covering all revenue-related bills. To the contrary, past congressional enactments, totally ignored by the court, indicate the exact opposite. More importantly, the court's ruling directly conflicts with the decisions not only of other circuits but of this Court as well on the justiciability of Origination Clause challenges. Finally, the decision below effectively nullifies one of the few constitutional restraints on the federal taxation power; as such, it presents an issue of overriding public importance which this Court should review.[5]

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[5] As the Court of Appeals noted, a number of other courts have affirmed TEFRA on the merits. *See* cases cited at 772 F.2d at 168, App. at A10. Lest it appear to this Court that the ultimate issue of TEFRA's validity has already been resolved beyond question, we respectfully point out the following: Nearly all of these other cases involved *pro se* litigants challenging TEFRA's increased penalties for frivolous tax returns. The issue of whether a tax cut is a revenue-raising bill is dealt with in only a few of these cases and, in those instances, it is summarily disposed of in a sentence or two. The potential for such cases to fail to fully consider the issues is clear. *See, e.g., Nadeau v. Helgemoe*, 423 F. Supp. 1250, 1254 (D.N.H. 1976), *modified on other grounds*, 561 F.2d 411 (1st Cir. 1977) (wherein the court reversed its own prior ruling in a *pro se* case due to inadequate briefing by the parties).

The one exception is *Armstrong v. United States*, 759 F.2d 1378 (9th Cir. 1985). However, as is shown at pages 23-29, *infra*, that decision contains a major historical error and is open to serious question.

SUMMARY OF ARGUMENT

In ruling that the meaning of the Origination Clause is nonjusticiable, the Court of Appeals essentially abdicated its responsibility to declare the law. It had no basis for doing so. The *de novo* inquiry into the purpose and meaning of this provision, which the court disparaged as judicial second-guessing, is in fact the basic duty of the judiciary when faced with a constitutional issue.

The Court of Appeals claimed that it was accepting an established congressional interpretation of the term "bills to raise revenue" as encompassing all revenue-related legislation; however, Congress has repeatedly enacted Senate-originated tax cuts, a practice which flatly contradicts such a reading. Moreover, the Supreme Court and other circuits have expressly held Origination Clause issues to be justiciable, encountering none of the political question factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962). The Court of Appeals stated that a bill's revenue effects are too variable to be reliably ascertained, but neither Congress itself nor any other court has had difficulty in concluding that TEFRA originated as a bill to reduce taxes, not increase them. In addition, the revenue effects of particular bills have been held to be constitutionally significant in other contexts as well.

The Origination Clause was intended to restrain the imposition of taxes by placing the politically unwelcome responsibility for their origination in the hands of the most immediate representatives of the people. The transformation of TEFRA from a House-originated tax cut into a massive tax increase effectively robs this provision of all meaning. The cursory decisions of other courts

affirming TEFRA are contradicted both by Congress's own historical practice and by federal and state case law. The ultimate issue of TEFRA's validity is still open and should be reviewed by this Court.

ARGUMENT

I.

BY REFUSING TO REVIEW CONGRESS'S ALLEGED INTERPRETATION OF THE ORIGINATION CLAUSE, THE COURT OF APPEALS ABDICATED ITS JUDICIAL RESPONSIBILITY TO DECLARE THE LAW

The Court of Appeals did not rest its affirmance of TEFRA on any degree of deference accorded to the congressional reading of the Origination Clause; the court never even got that far in its treatment of the issue. Instead, it simply closed the door on the matter at the very outset. In its words, when presented with congressional treatment of a supposedly ambiguous constitutional provision, a court "should not intrude into the deliberative processes of Congress to modify that judgment." 772 F.2d at 167, App. at A9. Any other course would allegedly constitute "judicial second-guessing." *Id.* at 166, App. at A7.

As will be shown shortly, the court was not here confronted with a challenge to some established, consistent congressional interpretation of the Origination Clause; to the contrary, at least a score of congressional enactments directly contradict the understanding of the clause which the court ascribed to Congress. At the outset, however,

it should be emphasized that what the Court disparaged as intrusive second-guessing is in fact the essence of judicial duty—interpreting the Constitution. That duty simply cannot be avoided by invoking the possibility of conflict with Congress:

> "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969) (footnote omitted).[6]

No matter how extensively Congress may have debated TEFRA's validity, and no matter what its rationale may have been in enacting it, the question of TEFRA's compliance with the Origination Clause must ultimately be decided by the judiciary:

> "No policy . . . suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 941-42 (1983) (footnote omitted).[7]

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[6] The Fifth Circuit also noted that it

> "cannot be blind to the potential for vast fiscal upheaval if we undertook a *de novo* review of the Congressional interpretation given the origination clause." 772 F.2d at 167, App. at A8.

The importance of an unconstitutional enactment cannot, of course, cure its invalidity. In this particular case, however, it is very possible that Congress could minimize any potential fiscal upheaval through its power to impose retroactive taxes. *See, e.g., United States v. Darusmont*, 449 U.S. 292, 296-301 (1981).

[7] The Fifth Circuit attempted to distinguish *Chadha's* invalidation of the legislative veto from this case on the ground that the

(Continued on following page)

Such a decision is precisely what the Court of Appeals was faced with and avoided. In foreclosing the Origination Clause issue with its ruling of nonjusticiability, it did what the Supreme Court has plainly proscribed: "We . . . do not abdicate our ultimate responsibility to decide the constitutional question. . . ." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

II

THE ALLEGED CONGRESSIONAL INTERPRETATION OF THE ORIGINATION CLAUSE WHICH THE COURT REFUSED TO REVIEW IS SO CONTRADICTED BY PAST CONGRESSIONAL ACTIONS THAT IT CANNOT EVEN BE SAID TO EXIST

The court's decision reads as if there is an established congressional construction of the Origination Clause. In fact, if one pokes through the court's curtain of nonjusticiability and actually examines congressional practice, one finds anything but consistency. During the House debate over TEFRA's validity, for example, its most vigorous champion, the Ways and Means Committee Chairman, defended the Senate's massive amendment of the bill as amply within the "constitutional prerogatives, and the

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(Continued from previous page)

former involved a "sheer lack of authority" while the latter deals only with Congress's "allocation of its essential legislative responsibilities." 772 F.2d at 166, App. at A5. This distinction is purely rhetorical. If TEFRA's enactment violated the Origination Clause, then its passage *did* involve a sheer lack of congressional authority on the part of the House and Senate, violating the "different principles of action" by which the Framers "divide[d] the legislature into different branches." *Chadha*, 462 U.S. at 950 (citation omitted).

country's protection, under . . . the origination clause." 128 Cong. Rec. H4777 col. 3 (daily ed. July 28, 1982) (Rep. Rostenkowski). Yet less than a year before, the same Chairman had successfully opposed another Senate amendment on the ground that it "goes far beyond the Senate's power" under the clause. 127 Cong. Rec. H5976 col. 2 (daily ed. Aug. 4, 1981). At that time he stressed the necessity of

> "making it clear that Senate amendments to [House revenue] bills are properly amendments and not new initiatives attached to House bills solely for the purpose of avoiding the constitutional rights of this body." *Id.*

Such a congressional about-face on the Origination Clause is by no means new. An 1872 Senate Finance Committee report, for example, complained that the House, "exalting its prerogative [under the clause], asserts upon one occasion what it denies upon another. . . ." *See* 2 *Hinds' Precedents of the House of Representatives* § 1489 at 952 (1907).

What Congress has in fact done in the way of enactments is even more significant than the pronouncements of its members and committees. If, as the Court of Appeals claimed, the Origination Clause term "bills for raising revenue" encompasses *all* revenue-related measures, then the House would have the exclusive power to originate tax reductions as well as tax increases. However, as the following list indicates, Congress has repeatedly enacted tax-reducing legislation which originated not in the House, *but in the Senate:*

a. *Senate-Originated Acts To Repeal Taxes:*

—Pub. L. No. 74-433, 49 Stat. 1106 (S. 3934) (1936), entitled "An Act To Repeal the Kerr Tobacco

Act, the Bankhead Cotton Act of 1934, and the Potato Act of 1935." (All three of the repealed acts imposed substantial sales taxes on their respective commodities. *See* Section 3 of Pub. L. No. 73-483, 48 Stat. 1275, 1276 (1934); Section 4 of Pub. L. No. 73-169, 48 Stat. 598, 599 (1934); Section 202 of Pub. L. No. 74-320, 49 Stat. 750, 783 (1935));

—Act of June 1, 1842, ch. 32, 5 Stat. 489 (S. 71), "An Act regulating intercourse with the port of Cayenne . . . and to remit certain duties";*

—Act of July 4, 1836, ch. 359, 5 Stat. 125 (S. 214), "An Act to suspend the discriminating duties upon goods imported in vessels of Portugal, and to reduce the duties on wines";*

—Act of May 31, 1830, ch. 219, 4 Stat. 425 (S. 2), "An Act to repeal the tonnage duties upon ships and vessels of the United States, and upon certain foreign vessels";*

—Act of March 3, 1815, ch. 77, 3 Stat. 224 (S. 87), "An Act to repeal so much of the several acts imposing duties on the tonnage of ships and vessels. . . ."*

b. *Senate-Originated Acts To Create Categorical Tax Exemptions:*

—Pub. L. No. 86-522, 74 Stat. 219 (S. 2954) (1960), "An Act to exempt from the District of Columbia income tax compensation paid to alien employees by certain international organizations";

—Pub. L. No. 86-125, 73 Stat. 271 (S. 1976) (1959), "An Act to make payments to Indians for destruction of fishing rights at Celilo Falls exempt from income tax";

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* The "S." numbers for these early bills are not contained in Statutes at Large, but are taken from E. Nabors, *Legislative Reference Checklist* (1982).

—Pub. L. No. 85-82, 71 Stat. 276 (S. 1576) (1957), "An Act to exempt the sale of materials for certain war memorials in the District of Columbia from the District of Columbia Sales Tax Act";

—Pub. L. No. 81-416, 63 Stat. 938 (S. 1580) (1949), "An Act Concerning Common-Trust Funds . . .," Section 2 of which exempts such funds from District of Columbia income and franchise taxes.

c. *Senate-Originated Acts To Expand Tax Deductions or Otherwise Relieve Tax Burdens:*

—Pub. L. No. 96-249, 94 Stat. 357 (S. 1309) (1980), "An Act to amend the Food Stamp Act of 1977 to improve food stamp program fiscal accountability . . .; *to improve the system of deductions* . . ." (emphasis added);

—Pub. L. No. 76-861, 54 Stat. 1178 (S. 4270) (1940), "An Act to promote and strengthen the national defense by suspending enforcement of certain civil liabilities of certain persons serving in the Military . . .," which defers the collection of property and income taxes of military personnel who are unable to pay them. *See* Sections 500 and 513, 54 Stat. 1186 and 1190.

If the Senate had never originated any of this legislation, or if Congress had never enacted it, TEFRA's validity would still be open to question. However, as the above enactments demonstrate, Congress has obviously ***not***, as a matter of history, given the Origination Clause the interpretation ascribed to it by the Court of Appeals—namely, that all revenue-related legislation must originate in the House.[8]

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[8] This alleged construction is further undermined by other Senate-originated enactments which deal with the administration of tax laws rather than with changes in the amount of tax

(Continued on following page)

As for the enactment of TEFRA itself, if there is any congressional interpretation of the Origination Clause that can be said to be implicit in that action, it is that whatever the clause means at a given time is what Congress *says* it means. For example, the House Ways and Means Committee Chairman claimed that the

> "House has always had and will always have, the power to determine the full scope of its constitutional prerogatives, and the country's protection, under . . . the origination clause." 128 Cong. Rec. H4777 col. 3 (daily ed. July 28, 1982) (Rep. Rostenkowski).

This notion that the provision's meaning can be changed at will may have been based on the belief that Congress had nothing to fear from the judiciary on this matter:

> "[W]hen Congress has used this procedure in past, the courts have not been willing to look beyond the H.R. number on the bill even though most of the substance actually originated in the Senate." *Id.* at H4782 col. 3 (daily ed. July 28, 1982) (Rep. Frenzel).

Whatever support this approach has lies not in law but in *Looking-Glass* fiction, and should be repudiated by this Court.[9]

(Continued from previous page)

collected. *See, e.g.*, Pub. L. No. 82-493, 66 Stat. 518 (S. 2605) (1952), "An Act to amend certain tax laws applicable to the District of Columbia"; Pub. L. No. 79-261, 59 Stat. 610 (S. 1278) (1945), "An Act to provide for the taxation of rolling stock of railroads . . . operated in the District of Columbia . . . ."

9 " 'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what *I* choose it to mean—neither more nor less.' " *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 n.18 (1978), quoting, "Through the Looking Glass" in *The Complete Works of Lewis Carroll* 196 (1939).

III

THE COURT'S RULING CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND OF THE SUPREME COURT ON THE JUSTICIABILITY OF ORIGINATION CLAUSE ISSUES

The court's approach contradicts not only the general law of judicial review, but also the line of cases regarding the reviewability of Origination Clause challenges in particular. In *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916), a congressional enactment was stricken on the very ground that it violated the clause, the court holding the statute "vitiate[d]" by the "careless journey work" involved in its enactment. *Id.* at 140. In *Bertelsen v. White*, 65 F.2d 719 (1st Cir. 1933), the First Circuit found no impediment to reaching the merits of another Origination Clause attack. While the court upheld the statute at issue, one of its grounds directly contradicts the revenue-related interpretation adopted by the Fifth Circuit. The statute in *Bertelsen*, according to the First Circuit, "is not a bill to raise revenue. . . . *On the contrary*, it *diminishes* the revenue of the government." 65 F.2d at 722 (emphasis added; citations omitted).

As for the TEFRA cases which have arisen in other circuits, those courts have, as the Fifth Circuit admitted, "proceeded to adjudicate the merits" of the Origination Clause issue. 772 F.2d at 167, App. at A8. In *Armstrong v. United States*, 759 F.2d 1378 (9th Cir. 1985), the Ninth Circuit examined each of the factors counseling nonjusticiability which this Court set out in *Baker v. Carr*, 369 U.S. 186 (1962):

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

> a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

The court found that the Origination Clause issue did not implicate any of these factors:

> "None of these conditions is present in this case. There is no dispute concerning the sequence of events and procedures by which Congress enacted TEFRA. We are required to determine only whether those procedures comported with the origination clause of the Constitution. This determination does not require delving into the internal records or workings of Congress, *and is particularly well-suited to judicial resolution.*" *Armstrong*, 759 F.2d at 1380 (emphasis added).

In *Moore* the District of Columbia Circuit implicitly came to the same conclusion. It dismissed a challenge to TEFRA filed by congressmen, relying in large part on the express ground that private taxpayers do

> "have standing to challenge the constitutionality of TEFRA under the Origination Clause, so the issue will not go unresolved." *Moore*, 733 F.2d at 956 (footnote omitted).

When this decision is coupled with the Fifth Circuit's ruling, unfortunately, that prediction no longer stands.

Most importantly, the Supreme Court itself has reached the merits in several Origination Clause cases, of

which the most relevant is *Flint v. Stone Tracy Company*, 220 U.S. 107 (1911). In that case a House-originated bill proposing a new inheritance tax was amended in its entirety by the Senate, which replaced the inheritance tax with a corporation tax. *Id.* at 143. The Court upheld the tax on the ground that the "amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose." *Id.*

The issue in *Flint* was only the scope of the Senate's amending power under the Origination Clause. The Supreme Court was not concerned with whether a tax cut constitutes a "bill for raising revenue" because it was dealing only with the substitution of one tax increase for another.[10] Nonetheless, the Court *did rule* on the issue of the act's compliance with the Origination Clause, rather than simply accept Congress's action as self-justifying. Because the question of Origination Clause compliance was deemed justiciable in *Flint*, it necessarily follows that the *interpretation* of the clause is *also* justiciable: "Those who apply [a] rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

The Ninth Circuit in *Armstrong* came to precisely this conclusion: "The Supreme Court has already implicitly determined [in *Flint*] that an origination clause challenge

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[10] "A principle frequently applied is that the Senate may substitute one kind of tax for a tax that the House has proposed, but may not impose a tax if one had not originally been proposed by the House." 3 *Deschler's Precedents of the United States House of Representatives* 314 (1977).

to the enactment of a revenue law . . . is justiciable." 759 F.2d at 1380.

In short, the Fifth Circuit was simply incorrect when it claimed that the "Supreme Court's encounters with the origination clause . . . do not foreclose our approach." 772 F.2d at 167, App. at A9.[11]

IV

CONTRARY TO THE FIFTH CIRCUIT'S CLAIM, THE HISTORY OF THE ORIGINATION CLAUSE DEMONSTRATES THAT TEFRA'S ENACTMENT IS ANTITHETICAL TO THE FRAMERS' INTENT, WHICH WAS TO RESTRAIN THE IMPOSITION OF TAXES, NOT THEIR REDUCTION

Despite the fact that its decision contains no consideration of the legislative background of the Origination Clause, the Fifth Circuit asserted that TEFRA's enactment is "consistent with the limitations on authority contained" within that provision. 772 F.2d at 167, App. at A9. In fact, the Framers' intent and TEFRA's passage cannot be reconciled.

The Origination Clause was intended to restrain the taxation power by placing the unwelcome responsibility of

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[11] The court stated that its decision will attribute finality to congressional enactments. 772 F.2d at 166, App. at A7. Aside from the fact that this objective does not justify the avoidance of judicial review, it is doubtful whether it will even be achieved by the court's decision. If legislation which reduces revenue must originate in the House, then the validity of each of the enactments listed at pages 14-16, *supra*, is in jeopardy, as is that of all similar statutes.

As for the court's reference to the official certification of the House Clerk that the bill originated in the House (772 F.2d at 166-67, App. at A7), this is totally beside the point. The issue in this case is not *where* TEFRA originated, but what it originated *as*.

initiating new or higher taxes in the hands of the chamber most immediately representative of the people—the House of Representatives. As George Mason of Virginia stated:

> "The consideration which weighed . . . was, that the first branch [the House] would be the immediate representatives of the people; the second would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it." 5 J. Elliot, *Debates on the Adoption of the Federal Constitution* 283 (1881).

Benjamin Franklin commented that

> "as it had been asked what would be the use of restraining the second branch from meddling with money bills, he could not but remark, that it was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim, that those who feel can best judge." *Id.* at 284.

The underlying purpose of the clause was most succinctly put by Hugh Williamson, the delegate from North Carolina, in his observation that the provision "will have one advantage; it will oblige some member in the lower branch to move, and people can then mark him." *Id.* at 189. As Joseph Story subsequently wrote, the idea was that the House "will be more watchful and cautious in the imposition of taxes." 1 J. Story, *Commentaries on the Constitution of the United States* § 876 (5th ed. 1905).

The clear intent of the Framers was thus to restrain the initiation of tax *increases*, not tax reductions, and it is this restraint which underlies the Origination Clause. TEFRA, on the other hand, could not have been enacted in a manner more contrary to that provision. *TEFRA's distinguishing feature is that no one in the House was obliged to move and be marked by the people as its originator.*

It passed into law without the House having to assume one shred of the responsibility which the Framers had deliberately placed upon it. It is no wonder that one court observed that "the idea that Congress 'pulled a fast one' is not totally devoid of merit", and that one congressman dubbed TEFRA the "Tax Bill of the Immaculate Conception." *Zeak v. United States,* 53 A.F.T.R. 2d 84-1316, 84-1319 (S.D. Ohio 1984); 128 Cong. Rec. H6628 col. 1 (daily ed. Aug. 19, 1982) (Rep. Lungren).

V

THIS COURT SHOULD ALSO REVIEW THE ISSUE OF TEFRA'S VALIDITY, WHICH REMAINS OPEN TO SERIOUS QUESTION NOTWITHSTANDING LOWER COURT DECISIONS TO THE CONTRARY

Given its holding of nonjusticiability, the Fifth Circuit refused to reach the merits of whether a bill to cut taxes is a "bill for raising revenue;" it did, however, note that decisions of at least two other circuits have answered this question affirmatively: *Armstrong, supra,* and *Wardell v. United States,* 757 F.2d 203 (8th Cir. 1985); *see* 772 F.2d at 166, App. at A6.

This Court may well wonder whether reversal of the nonjusticiability ruling below would result in anything more than its merely proceeding to affirm TEFRA on the merits, something which other courts have already done. *See* page 9, n.5, *supra.* For the reasons set forth below, we respectfully submit that it would. While a ruling on the justiciability of the Origination Clause is itself a matter of importance, the ultimate issue of TEFRA's validity is, as will be shown, far more questionable than the decisions to date indicate.

Of the above two appellate decisions on the merits, only *Armstrong* contains any substantive discussion of the scope of the term "bills for raising revenue."[12] As the following points indicate, however, its reasoning is seriously flawed.

A. The Senate's Origination of Tax Reductions Flies in the Face of Court Decisions That All Revenue-Related Bills Must Originate in the House

The court in *Armstrong* states that TACT's interpretation of the clause as covering only bills to increase taxes "runs sharply contrary to past practice, since the Senate has never regarded itself as being empowered to initiate any sort of revenue bill, even one that lowers taxes." 759 F.2d at 1381, citing *2 Hinds' Precedents* § 1489. This statement of congressional practice is simply and flatly wrong as a matter of history, as the numerous Senate-originated tax reductions listed at pages 14-16, *supra*, demonstrate.

As for *Hinds' Precedents*, the section cited in *Armstrong* quotes an 1872 Senate report to the effect that a bill that lowers tax rates is nonetheless a bill that raises revenue. However, that report goes on to state that a bill that *repeals* a tax is *not* a bill to raise revenue (*2 Hinds' Precedents* § 1489 at 952)—something that the court obviously ignored when it ruled that the term covers *all* revenue-related measures.

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[12] *Wardell* does no more on this point than to cite a district court decision whose own treatment of the issue consists of one unadorned sentence. *See Milazzo v. United States*, 578 F. Supp. 248, 252 (S.D. Cal. 1984), cited in *Wardell*, 757 F.2d at 205.

B. The Constitutional Distinction Between Bills Which Raise and Lower Taxes Has Been Recognized by Federal Courts, State Courts, and Congress Itself

The *Armstrong* decision also states that the revenue effects of proposed bills are so variable and subject to dispute that they cannot be judicially determined. 759 F.2d at 1381. This is also one of the grounds for the Fifth Circuit's decision. *See* 772 F.2d at 166, App. at A6. Whatever the difficulty may be of making such determinations for some bills, that difficulty is not present here. Neither the Fifth nor the Ninth Circuits had any problem determining that H.R. 4961 was originally "intended to reduce taxes." 772 F.2d at 164, App. at A2; *see also Armstrong*, 759 F.2d at 1380-81.[13]

Moreover, questions regarding a bill's revenue effects have not previously prevented courts from attaching constitutional significance to them. For example, as the Fifth Circuit itself noted, case law establishes that bills that only incidentally affect revenue do *not* fall within the Origination Clause. 772 F.2d at 167, App. at A9. Determining whether a particular bill's revenue effect is "incidental," however, is no easier than determining whether

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[13] Similarly, neither congressmen nor their constituents generally have any trouble distinguishing tax cuts from tax increases; in fact, both are usually quite vocal about the distinction. As one congressman said during the debate over TEFRA, "[i]t is always easy to drink from the cup when we are reducing taxes, it is always popular." 128 Cong. Rec. H4783 col. 3 (daily ed. July 28, 1982) (Rep. Jenkins).

it will raise or lower taxes, yet it is a task which courts have not hesitated to undertake.[14]

Similarly, whether taxes are raised or lowered may affect the constitutionality of tax treaties, which require only Senate ratification to become law. The Origination Clause has been construed "to prohibit the use of the treaty power to *impose* taxes" because it "precludes any method of . . . *raising* taxes other than through the enactment of laws by the full Congress." *Edwards v. Carter*, 580 F.2d 1055, 1058-59 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978) (emphasis added). On the other hand, the use of treaties to *lower* taxes is common: "[O]ur government regularly enters into treaties and conventions limiting the amount of tax that the United States may collect from its own citizens." *Coplin v. United States*, 6 Cl. Ct. 115, 134 (1984), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3448 (U.S. Jan. 13, 1986) (No. 85-559).

As previously pointed out, the distinction between bills which increase and decrease revenue has even been noted

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[14] As these "incidental effect" cases indicate, the Fifth Circuit's claim that there are no standards for judicially determining a bill's revenue effects does not withstand analysis. Moreover, the Supreme Court itself has adjudicated issues of congressional operation in areas where there was a near-total absence of standards and precedents (e.g., the reapportionment issue in *Baker v. Carr*, 369 U.S. 186 (1962)), and where the constitutional commitment of the issue to Congress appeared on its face to be complete (e.g., overturning the expulsion of a congressman in *Powell v. McCormack*, 395 U.S. 486 (1969) despite the Constitution's declaration that each House is "the judge of the . . . qualifications of its own members." Art. I, § 5). *See, e.g.*, R. Berger, *Impeachment: The Constitutional Problems* 103-09 (1973).

in the context of the Origination Clause. *Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (*see* page 18, *supra*). Moreover, courts in at least five states have made similar distinctions in construing analogous provisions in state constitutions,[15] while only one state has taken the contrary view.[16]

Even the House of Representatives itself recognized the constitutional distinction between raising and lowering taxes in its procedural rules. From 1794 to 1874, the House required that:

> "No sum or quantum of tax or duty voted by a Committee of the Whole House shall be *increased* in the House until the motion or proposition for such increase shall first be discussed and voted in [such]

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[15] As one New Jersey court noted:

> "Obviously . . . it is not in itself a bill for raising revenue; its purpose and effect is rather somewhat to decrease revenue than to increase it. Apparently in England such an amendment must originate in the House of Commons . . . but no authority has been cited or found which lays down a similar rule in this country. *Indeed, such of those authorities in this country, cited by counsel, as touch upon the point, tend to indicate a contrary view.*" *In re Paton's Estate*, 114 N.J. Eq. 324, 327, 168 A. 422, 424 (Prerog. Ct. 1933) (emphasis added; citations omitted).

See also State v. Lasky, 156 Me. 419, 423, 165 A.2d 579, 581 (1960); *Dalton v. State Property and Buildings Commission*, 304 S.W.2d 342, 350-51 (Ky. 1957); *Thompson v. Huston*, 170 Okla. 195, 39 P.2d 524 (1935); *Andrews v. Lathrop*, 132 Vt. 256, 315 A.2d 860 (1974).

[16] *Weissinger v. Boswell*, 330 F. Supp. 615, 624 (M.D. Ala. 1971). Even in Alabama, however, a gasoline tax *refund* act was held *not* to be a bill for raising revenue. *In re Opinion of the Justices*, 31 So. 2d 558 (Ala. 1947).

> Committee . . . ." 5 *Hinds' Precedents* § 4792 (1907) (emphasis added).[17]

The constitutional underpinning of this rule was made clear by a House chairman:

> "The Constitution . . . is very careful in throwing guards around the tax-imposing power; and hence it requires that all bills imposing taxes shall originate in the House of Representatives. The 132d rule of the House, *in pursuance of this jealous policy of the Constitution*, declares [as quoted above], the object being to secure full discussion upon every question involving the taxing power." 1851 Cong. Globe, 31st Cong., 2d Sess. at 366 col. 1 (emphasis added).

C. TEFRA'S Affirmance Would Rob the Origination Clause of the Underlying Purpose of the Framers

Neither *Armstrong* nor any other decision affirming TEFRA contains the slightest clue as to what substantive meaning is left to the Origination Clause under their approach. Given that the intent of the Framers was to restrain the origination of new or higher taxes, (*see pages* 21-23, *supra*), the silence of the courts on this issue is not surprising; their decisions leave the Origination Clause with no real meaning whatsoever.

During the debates over ratification of the Constitution, the "power over the purse" contained in the Origination Clause was represented to the people as its "most

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[17] The Committee of the Whole House is a means by which the House can act with less than a normal quorum. Given the current House membership of 435, this mechanism allows the House to act with only 100 members present, rather than the normally required majority of 218. *See, e.g,* C. J. Zinn, *How Our Laws Are Made* 26 (1978) (H.R. Doc. No. 259, 95th Cong., 1st Sess.).

compleat and effectual weapon . . . for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.'' J. Madison, *The Federalist* No. 58 at 297 (G. Wills ed. 1982). One can conceive of no more complete an emasculation of that provision than to allow the transformation of a House decision to reduce taxes into an enacted tax increase of TEFRA's magnitude. Instead of a restraint on government power, the clause becomes an empty formality of House stationery; any tax legislation passes muster so long as it carries an H.R. number.

There is nothing in the language or history of the Origination Clause which justifies such a fate, either for that provision or for the public whom it was intended to protect. This Court should not allow that result to come to pass.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Fifth Circuit Court of Appeals.

DATED: January 27, 1986.

Respectfully submitted,

RONALD A. ZUMBRUN
SAM KAZMAN*
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioner

**Counsel of Record*

APPENDIX

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,

Plaintiff-Appellant,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 84-5021.

United States Court of Appeals, Fifth Circuit.

Sept. 30, 1985.

Sam Kazman, Ronald A. Zumbrun, Washington, D.C., for plaintiff-appellant.

Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Div., U.S. Dept. of Justice, Michael L. Paup, Chief, Appellate Sec., Richard Farber and Michael J. Roach, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY and JOLLY, Circuit Judges, and SANDERS,* District Judge.

SANDERS, District Judge:

Texas Association of Concerned Taxpayers, Inc. (TACT) appeals the district court's judgment dismissing its action under rule 12(b)(6), Fed.R.Civ.P. We affirm.

I.

TACT commenced this suit under 26 U.S.C. § 7422 for the refund of $3.11 of federal excise tax paid on its telephone bills. This sum is attributable to the enactment of

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* District Judge of the Northern District of Texas, sitting by designation.

Section 282(a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 (TEFRA). TACT contends that the passage of TEFRA violated the origination clause contained in article I, section 7, clause 1 of the United States Constitution.

The origination clause states:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

On December 5, 1981, the House of Representatives passed a bill entitled the Miscellaneous Revenue Act of 1981, H.R. 4961. As the bill number indicates, this bill had originated in the House. In the form passed by the House, H.R. 4961 was intended to reduce taxes. The total revenue effect of the tax provisions were projected to be a reduction of revenues ranging from $69 million in fiscal year 1982 to $301 million in fiscal year 1986. H.R.Rep. No. 404, 97th Cong., 1st Sess. at 38. Complaint ¶ 15.

Upon reaching the Senate, H.R. 4961 was referred to the Senate Finance Committee, which struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal. Instead of reducing the amount of revenue collected, the bill as amended proposed to increase tax revenues by over $92 billion in fiscal years 1983-85, and by over $218 billion through fiscal year 1987. The bill passed by the Senate on July 23, 1982, was largely unchanged from that reported out of the Committee. Complaint ¶ 16.

Upon the bill's return to the House, Representative Rousselot offered a resolution to the House which proposed to resolve that the Senate's amendments to H.R. 4961 contravened the origination clause. The Chairman of the House Ways and Means Committee moved to table

the resolution. The motion to table carried the House. The Chairman, at the direction of the Committee, then moved to send H.R. 4961 to conference with the Senate, without first referring it back to the House Committee on Ways and Means. The House agreed to that motion after considerable constitutional debate, and the bill was sent to conference. Complaint ¶ 17; *Moore v. U.S. House of Representatives,* 733 F.2d 946, 949 (D.C.Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985).

On August 17, 1982, the conference committee reported its version of H.R. 4961, which closely resembled the Senate-passed bill. The conference bill would increase tax revenues by $91.5 billion in fiscal years 1983-85 and by over $205 billion in fiscal years 1983-87. Complaint ¶ 19. On August 19, 1982, the House and the Senate each passed the bill and H.R. 4961 was signed into law by the President on September 3, 1982. Complaint ¶ 20.

TACT does not claim that the bill that became TEFRA did not originate in the House of Representatives. Rather, it contends that upon its origination it was not a bill for "raising revenue" within the meaning of the origination clause because the net effect of the bill would have been to reduce the amount of revenue collected. Thus, it is argued, when the Senate amended H.R. 4961 so that the net effect of the bill's provisions was to increase the revenue yield, the bill became one for raising revenue for the first time and it originated improperly in the Senate.

TACT also asserts that if H.R. 4961 in its original form is a revenue-raising measure, the Senate's amendments are unlawful as exceeding the scope of the Senate's power to amend with respect to any type of bill.

II.

TACT's primary claim turns on whether the phrase in the origination clause referring to "bills for raising revenue" means bills that increase revenue or whether it refers to all bills relating to revenue—revenue-increasing or revenue-decreasing—in which case TEFRA constitutionally originated in the House. We are of the opinion that this issue poses a nonjusticiable controversy.

The doctrine of nonjusticiability based on the presence of a political question is part and parcel of the separation of powers and is concerned with whether an issue is appropriate for judicial determination. *Metzenbaum v. FERC*, 675 F.2d 1282 (D.C.Cir.1982). A question is properly deemed political when resolution is committed by the Constitution to a branch of the federal government other than the judiciary. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

The Supreme Court in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), observed that each of the varying formulations which may be used to describe a nonjusticiable political question "has one or more elements which identify [the question] as essentially a function of separation of powers." The Court then listed the elements found in previous cases:

> . . . Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning ad-

> herence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217, 82 S.Ct. at 710; *See also INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 2779, 77 L.Ed.2d 317 (1983).[1]

Every challenge to the constitutionality of a statute is not transformed into a political question because the claim is one against Congress' authority to enact the law. *Chadha,* 103 S.Ct. at 2779. The judicial branch is, of course, the final arbiter of the constitutionality of a statute. *Marbury v. Madison,* 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803).

This case differs from *Chadha,* where the Supreme Court held that review of the "legislative veto" scheme was not barred by the political question doctrine. In *Chadha,* the Court was faced with a situation in which the House purported to exercise full legislative authority with no provision for passage by the Senate and presentation to the President. After examining the "explicit, unambiguous" constitutional exceptions that authorized unilateral House action, the Court concluded that the House was without a permissible basis of authority for its action. 103 S.Ct. at 2786-87. *See also Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (review is proper when House action is without constitutional basis of authority). By contrast, the manner of TEFRA's passage is not an issue of sheer lack of authority bounded by "explicit, unambiguous" cornerstones, but rather one of the permissible interpretations of language by which

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1. On the other hand, "the political question doctrine has been described as no doctrine at all, but rather a group of quite different questions which have been characterized as political." *Citizens for Management of Alaska Lands v. Department of Agriculture,* 447 F.Supp. 753, 755 (D.Alaska 1983).

Congress is to guide the allocation of its essential legislative responsibilities.

"Raising revenue" certainly is an ambiguous term. TACT vehemently contends that history dictates an interpretation equating it with "increasing revenue," *see also Bertelsen v. White,* 65 F.2d 719, 722 (1st Cir.1933) ("It is not a bill to raise revenue . . . . On the contrary, it diminishes the revenue of the government."), but all contemporary courts have adopted the construction apparently given it by Congress, i.e. "relating to revenue." *See, e.g., Armstrong v. United States,* 759 F.2d 1378, 1381-82 (9th Cir. 1985); *Wardell v. United States,* 757 F.2d 203, 205 (8th Cir.1985).

There are no judicially discoverable standards of resolution different or superior to those employed by Congress. Indeed, the Ninth Circuit was propelled to its decision by the precedents and debates of the Congress itself. 759 F.2d at 1381. It would be difficult to formulate any standard of constitutionality to adequately guide Congress down the chutes and rapids that it must continually face in dealing with this clause. The fluctuations in national income and corresponding shifts in revenue yields make any label of "increasing revenue" a slippery and potentially chameleonic one. The same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others. *See Twin City Bank v. Nebeker,* 167 U.S. 196, 202, 17 S.Ct. 766, 769, 42 L.Ed. 134 (1897) ("What bills belong to that class [of bills for raising revenue] is a question of such great magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."); *Dyer v. Blair,* 390 F.Supp. 1291, 1302, n. 26 (N.D.Ill.1975) (three-judge court).

Judicial second-guessing of the meaning of the origination clause would also inherently express a "lack of the respect due [a] coordinate [branch] of government." *Baker,* 369 U.S. at 217, 82 S.Ct. at 710. The House is certainly aware of its constitutional prerogatives and spent considerable time debating the application of the clause to the circumstances before it, making especially appropriate the customary deference accorded the judgments of Congress. *Rostker v. Goldberg,* 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981). Indeed, resolution of this particular controversy has been found to require a court "to meddle in the internal affairs of the legislative branch." *Moore, supra,* 733 F.2d at 956.

Yet another consideration militating against review, presaging the final two *Baker* factors, is "the appropriateness under our system of government of attributing finality to the action of the political departments." *Coleman v. Miller,* 307 U.S. 433, 454, 59 S.Ct. 972, 982, 83 L.Ed. 1385 (1939); *Dickson v. Ford,* 521 F.2d 234, 236 (5th Cir. 1975), *cert. denied,* 424 U.S. 954, 96 S.Ct. 1428, 47 L.Ed.2d 360 (1976). Unlike legislation violating the establishment clause or the requirement of bicameralism, the claimed defect in TEFRA cannot be discerned by an examination of the law's text. Indeed, the engrossed copy of TEFRA presented to the President bears the certification of the Clerk of the House that the act "originated in the House of Representative." Brief of Appellee, Appendix B at 30.

In *Field v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892), the Supreme Court rejected a challenge to a revenue act in which it was claimed that certain portions of the act, as appearing in the engrossed version, were

never actually considered by Congress, an allegation at least as egregious as that argued by TACT. The Court declined to look beyond the enrolled bill to the journals of Congress, the reports of committees or other Congressional documents to determine the true contents of the bill. Justice Harlan noted:

> We recognize, on one hand, the duty of this Court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this Court should feel obliged in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interest of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives [is invalid].

143 U.S. at 669, 12 S.Ct. at 496.

This Court cannot be blind to the potential for vast fiscal upheaval if we undertook a *de novo* review of the Congressional interpretation given the origination clause.

We recognize that other courts faced with challenges to TEFRA have proceeded to adjudicate the merits of the case and proclaim a definition of "raising revenue" to bind Congress. We decline to follow such rulings.[2] The

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2. A similar divergence in views has arisen in the scholarly literature concerning the meaning to be ascribed to the terms "other high Crimes and Misdemeanors" in art. II, § 4. The commentators are divided on where the power to ascribe meaning to these two terms resides and whether the final effectiveness of the Congressional judgment of conviction must await disposition in the federal courts. *See* Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) (1981 supp.)* at 95.

Supreme Court's encounters with the origination clause likewise do not foreclose our approach. In *Millard v. Roberts,* 202 U.S. 429, 26 S.Ct. 674, 50 L.Ed. 1090 (1906) and *Twin City Bank v. Nebeker, supra,* the Court examined the status under the origination clause of bills that only incidentally affected revenue. In so doing, the Court applied a principle first announced in *United States v. Norton,* 91 U.S. (1 Otto) 566, 569, 23 L.Ed. 454 (1876). In *Norton,* the Court deferred to Congress' definitional judgment as to the meaning of "revenue laws" for purposes of the origination clause. Justice Swayne wrote that "the construction of this limitation is practically well settled by the uniform action of Congress." 91 U.S. (1 Otto) at 569. In *Flint v. Stone Tracy Company,* 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911), interpretation of the terms of the clause was not at issue.

Accordingly, we hold that where, as here, a constitutional provision governing the mode of internal operation of Congress contains a word or phrase susceptible of more than one meaning, and Congress has given that word or phrase an interpretation consistent with the limitations on authority contained in the provisions, the courts should not intrude into the deliberative processes of Congress to modify that judgment. Such an inquiry poses a nonjusticiable political question.

III.

TACT also contends that the Senate's amendment of TEFRA, substituting a substantial tax increase for the House-authored tax cut, altered the legislation beyond the permissible scope of amendment.

Although some of the same considerations as noted above are present, suggesting nonjusticiability of this issue of Congressional internal procedure,[3] TACT's contention is squarely foreclosed by *Flint, supra,* in which the Senate's substitution of a corporation tax for a House-drafted inheritance tax was upheld by the Supreme Court, which stated that "the amendment was germane to the subject matter of the bill and not beyond the power of the Senate to propose." 220 U.S. at 143, 31 S.Ct. at 346. "Subject matter" appears to merely require that both the amendment and the amended portion address revenue collection. *Accord Boday v. United States,* 759 F.2d 1472 (9th Cir.1985); *Armstrong v. United States,* 759 F.2d 1378 (9th Cir.1985); *Harris v. United States,* 758 F.2d 456 (9th Cir.1958); *Wardell v. United States,* 757 F.2d 203 (8th Cir.1985); *Liljenfeldt v. United States,* 588 F.Supp. 966 (E.D.Wis.1984), *affirmed,* 753 F.2d 1077 (7th Cir.1977); *Rowe v. United States,* 583 F.Supp. 1516 (D.Del.1984), *affirmed,* 749 F.2d 27 (3d Cir.1984); *Kloes, supra; Milazzo v. United States,* 578 F.Supp. 248 (S.D.Cal.1984). The Senate's amendment, adding new taxes, was germane to the subject matter and thus within the range of amendments permitted by the origination clause. The district court's dismissal of this theory was proper.

AFFIRMED.

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3. One court addressing this contention observed that to entertain this argument would cast "a constitutional cloud over every revenue-raising measure which had been modified in the Senate in any way." *Kloes v. United States,* 578 F.Supp. 270, 273 (W.D.Wis.1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action
No. A-84-CA-314

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,

Plaintiff

VS.

THE UNITED STATES OF AMERICA,

Defendant

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

(Filed November 19, 1984)

On this the 16th day of November, 1984, came on to be considered the Defendant's Rule 12 Motion to Dismiss and Plaintiff's Motion for Summary Judgment.

Plaintiff is a nonprofit corporation formed for the purpose of informing the public on issues related to government taxation and spending. From August to September of 1983, Plaintiff paid a total federal telephone tax of $4.66, in connection with its use of a Southwestern Bell telephone in Austin, Texas.

Plaintiff alleges the federal statute imposing such federal telephone tax, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, is unconstitutional because it was passed by Congress in violation of Art. I, Sec. 7, cl. 1 of the Constitution (the

Origination Clause). Article 1, Sec. 7, cl. 1 of the Constitution provides as follows:

> All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Assuming every allegation of Plaintiff's complaint to be true, Plaintiff has stated no valid cause of action if TEFRA is constitutional.

Tax legislation passed in a similar manner has been held constitutional by the Supreme Court, *Flint v. Stone Tracey Co.*, 220 U.S. 107 (1911); and TEFRA has been held constitutional by the District Court of the Eastern District of Michigan, *Frent v. United States*, 52 A.F.T.R. 2nd 5822 (E.D. Mich., 1983).

The Court also holds TEFRA to be constitutional. Accordingly, it is

ORDERED the Plaintiff's Motion for Summary Judgment is DENIED, and further

ORDERED that Defendant's Motion to Dismiss with Prejudice is Granted

Signed this the 16th day of November, 1984.

/s/ WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-5021

D.C. Docket No. A-84-CA-314

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

(Filed November 12, 1985)

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY and JOLLY, Circuit Judge, and SANDERS*, District Judge

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 30, 1985

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* District Judge of the Northern District of Texas, sitting by designation.

ISSUED AS MANDATE: NOV. 8, 1985

Clerk, U.S. Court of Appeals,
/s/ Karen L. Comeaux
Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-5021

TEXAS ASSOCIATON OF CONCERNED TAXPAYERS, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Filed October 29, 1985

Appeal from the United States District Court for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9-30-85, 5 Cir., 198—, — F.2d —)

Before REAVLEY and JOLLY, Circuit Judges, and SANDERS,* District Judge.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

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* District Judge of the Northern District of Texas, sitting by designation.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

Section 282 of TEFRA, Pub. L.
No. 97-248, 96 Stat. 568 (1982)

SEC. 282. EXTENSION OF EXCISE TAX ON COMMUNICATION SERVICES.

(a) In General.—Section 4251 (relating to imposition of tax on communications services) is amended by striking out subsections (a) and (b) and inserting the following new subsections.

"(a) Tax Imposed.—

"(1) In General.—There is hereby imposed on amounts paid for communications services a tax equal to the applicable percentage of amounts so paid.

"(2) Payment of Tax.—The tax imposed by this section shall be paid by the person paying for such services.

"(b) Definitions.—"For purposes of subsection (a)—

"(1) Communications Services.—"The term 'communications services' means—

"(A) local telephone service;

"(B) toll telephone service; and

"(C) teletypewriter exchange service.

"(2) Applicable Percentage.—"The term 'applicable percentage means—

"With respect to amounts paid pursuant to bills first rendered—	The percentage is—
During 1983, 1984, or 1985	3
During 1986 or thereafter	0.".

(b) Effective Date.—"The amendment made by subsection (a) shall apply with respect to amounts paid for communications services pursuant to bills first rendered after December 31, 1982.

Supreme Court, U.S.
FILED
APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1262

In the Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1262

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that the validity of the certification by the Clerk of the House of Representatives that the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 *et seq.*, originated in the House of Representatives, presents a nonjusticiable issue.

1. Petitioner paid $4.66 in federal excise tax on its telephone bills for August and September of 1983 (Pet. App. A11). Of this sum, $3.11 was attributable to an excise tax increase effected by Section 282(a) of TEFRA. See Pub. L. No. 97-248, § 282(a), 96 Stat. 568 (now codified at 26 U.S.C. 4251). Petitioner brought this suit in the United States District Court for the Western District of Texas seeking a

refund of that $3.11 in additional telephone excise tax (Pet. App. A1). Petitioner alleged that TEFRA as a whole was unconstitutional because it had originated in the Senate in violation of the Origination Clause (U.S. Const. Art. I, § 7, Cl. 1).

The district court held that the enactment of TEFRA did not violate the Origination Clause and accordingly dismissed petitioner's complaint (Pet. App. A11-A12). The court of appeals affirmed the district court's judgment, but did so without reaching the merits (*id.* at A1-A10). It held that petitioner's claim presented a nonjusticiable political question, because resolution of the claim was a matter committed by the Constitution to the legislative branch. The court noted (*id.* at A7) that the engrossed copy of TEFRA presented to the President for his signature bears the certification of the Clerk of the House that the Act "originated in the House of Representative[s]." The court of appeals concluded that it was not in the judicial province to look behind Congress's determination as to the origin of a particular bill (*id.* at A8-A9).

2. Although the court of appeals' resolution of the justiciability issue is in our view correct, we recognize that at least one other court of appeals has held, in a case involving an Origination Clause challenge to TEFRA essentially identical to petitioner's, that the matter of TEFRA's origin is a justiciable question. See *Armstrong* v. *United States*, 759 F.2d 1378, 1380 (9th Cir. 1985). Several other courts of appeals have reached the merits of Origination Clause challenges to TEFRA without discussing justiciability. See *Wardell* v. *United States*, 757 F.2d 203 (8th Cir. 1985) (per curiam); *Heitman* v. *United States*, 753 F.2d 33 (6th Cir. 1984) (per curiam); *Rowe* v. *United States*, 749 F.2d 27 (3d Cir.) (Table), aff'g mem. 583 F. Supp. 1516 (D. Del. 1984). This disagreement among the circuits, however, presents an issue of academic interest only. As petitioner concedes (Pet.

9 & n.5), every appellate court that has reached the merits has held that the enactment of TEFRA did not violate the Origination Clause. *Armstrong* v. *United States*, 759 F.2d at 1381-1382; *Wardell* v. *United States*, 757 F.2d at 205; *Heitman* v. *United States*, 753 F.2d at 35; *Rowe* v. *United States*, 583 F. Supp. at 1519. Cf. *Moore* v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, No. 84-389 (Jan. 7, 1985) (upholding dismissal of action brought by congressmen to challenge TEFRA on Origination Clause grounds). Since these decisions are correct and completely dispose of petitioner's claim for relief, there is no reason for the Court to grant certiorari in this case.

3. Contrary to the central theme of petitioner's submission, the bill that became TEFRA did originate in the House of Representatives. The bill that became TEFRA was introduced in the House as the Miscellaneous Revenue Act of 1981, H.R. 4961, 97th Cong., 1st Sess. (1981) (see Pet. App. A2). This bill was passed by the House and sent to the Senate on December 15, 1981. See 127 Cong. Rec. H9607, H9617 (daily ed. Dec. 15, 1981). The Senate proposed an amendment to the bill that supplanted the entire text of the House bill except for the enacting clause. The amended bill was passed by the Senate on July 22, 1982, renamed TEFRA, and sent back to the House. See 128 Cong. Rec. S9045-S9046 (daily ed. July 22, 1982). After considerable debate, the House voted to send the bill to conference. 128 Cong. Rec. H4777-H4788 (daily ed. July 28, 1982). The conference bill was passed by both the House and the Senate in August 1982 and sent to the President. The engrossed copy presented to the President bore a certification signed by the Clerk of the House, stating that TEFRA "had originated in the House of Representative[s]" (Pet. App. A7).

Despite this legislative history, petitioner maintains (Pet. 23-28) that TEFRA originated in the Senate because the initial House version of H.R. 4961 was projected to produce a substantial decrease in tax revenues, whereas the Senate version of H.R. 4961, which Congress ultimately passed, was projected to produce a substantial increase in tax revenues. According to petitioner, the requirement in the Origination Clause that "All Bills for raising Revenue shall originate in the House of Representatives" encompasses only those laws that increase taxes. It therefore follows, petitioner says, that H.R. 4961, although entitled the "Miscellaneous Revenue Act of 1981," was not a "Bill for raising Revenue" when it was proposed in the House, but instead was transformed into such a bill by the Senate.

The flaw in petitioner's analysis is its erroneous idea that the Origination Clause applies only to laws increasing taxes, as opposed to laws generally relating to revenues. Petitioner's interpretation is unsupported by any pertinent authority, is contrary to established congressional practice,* and has been uniformly rejected by the courts that have passed on the constitutionality of TEFRA. As stated by the Eighth Circuit in *Wardell* v. *United States,* 757 F.2d at 205:

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*See, *e.g.*, 2 A. Hinds, *Precedents of the House of Representatives* § 1489, at 949-953 (1907). The examples of Senate-originated bills to reduce or repeal taxes cited by petitioner (Pet. 14-16) are either pre-Civil War enactments of doubtful relevance under modern congressional practice, or else are incidental provisions in bills primarily intended for other purposes, such as the exercise of legislative authority over the District of Columbia, the regulation of interstate commerce and commerce with the Indian tribes, and the making of rules to regulate the status of members of the United States armed forces. This Court and the other courts that have considered the question have uniformly held that such incidental revenue provisions do not make a bill intended for other purposes subject to the Origination Clause. *E.g., Twin City Bank* v. *Nebeker,* 167 U.S. 196, 202 (1897); *United States* v. *Norton,* 91 U.S. 566, 569 (1875); *Bertelsen* v. *White,* 65 F.2d 719, 722 (1st Cir. 1933).

> We cannot agree that "revenue-raising" means only bills that increase taxes. Although the bill was dramatically altered by amendment in the upper house of Congress, it remained a revenue bill, regardless whether it raised taxes or lowered them.

Accord, *e.g.*, *Armstrong* v. *United States*, 759 F.2d at 1381-1382; *Heitman* v. *United States*, 753 F.2d at 35. See *Jolly* v. *United States*, 764 F.2d 642 (9th Cir. 1985).

The decisions rejecting petitioner's position follow from this Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911). That case involved an Origination Clause challenge to a revenue bill that was introduced in the House as a measure creating an inheritance tax, but which the Senate amended to establish a corporate tax instead. The Court held (220 U.S. at 143) that the enactment of the bill did not violate the Origination Clause, because (1) the bill had originated in the House and (2) the Senate amendment was "germane to the subject—matter of the bill [viz., revenue collection] and not beyond the power of the Senate to propose." In so holding, the Court found unpersuasive the argument that the Senate measure, ultimately passed by Congress, increased corporate taxes and was likely to raise total taxes to a greater extent than the proposed House bill.

Precisely the same reasoning applies here. The bill that became TEFRA, H.R. 4961, originated in the House. And the Senate amendment, as the court of appeals held (Pet. App. A9-10) and as petitioner now concedes (Pet. 8 n.4), was germane to the subject matter of the House bill and was "not beyond the power of the Senate to propose" (*Flint* v. *Stone Tracy Co.*, 220 U.S. at 143). The courts of appeals are thus correct in their uniform conclusion that the enactment of TEFRA did not violate the Origination Clause.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

DOJ-1986-04

(3)

Supreme Court, U.S.
FILED
MAY 5 1986
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CLERK

No. 85-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY TO THE UNITED STATES MEMORANDUM IN OPPOSITION

RONALD A. ZUMBRUN
SAM KAZMAN *
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Petitioner

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1262

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO THE UNITED STATES MEMORANDUM IN OPPOSITION

It is rare that the party opposing certiorari takes greater issue with the decision it is defending than with the petition it is attacking. This, however, is precisely what the United States does in its Memorandum in Opposition (Opp.). In the brief span of five pages, the government not only avoids responding to nearly every substantive argument raised in the Petition for Certiorari (Pet.), it also directly contradicts the decision below on two major points:

1. The government claims that the "central theme" of this case is that TEFRA [1] did not originate in the House

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[1] The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

of Representatives (Opp. at 3), implying that the petitioner is challenging the validity of the House Clerk's certification of the bill's origin. This is a straw-man issue which was specifically disclaimed ("The issue in this case is not *where* TEFRA originated, but what it originated *as*." Pet. at 21 n.11 (emphasis in original)) and which the Fifth Circuit expressly stated was not present in the case: "TACT does *not* claim that the bill that became TEFRA did not originate in the House of Representatives." Decision below, 772 F.2d 163, 165, Appendix to Petition (App.) at A3 (emphasis added). As the Fifth Circuit recognized, the issue before it was whether a measure to reduce taxes, which is what TEFRA originated as, constitutes a bill for raising revenue under the Origination Clause of the Constitution, Art. I, § 7, cl. 1.

2. The government also claims that TEFRA's validity "follow[s] from this Court's decision in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911)." Opp. at 5. The only Origination Clause issue present in *Flint*, however, was whether the Senate could take one House-initiated tax increase and replace it with another. This is solely a question of the Senate's power to amend. Since there was a House-initiated tax increase to begin with in *Flint*, the Supreme Court did not have to decide the applicability of the clause to tax-reduction measures, and that case has no bearing on this question.[2] In the words of the

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[2] The *Flint* decision is thus a straightforward application of the "principle frequently applied . . . that the Senate may substitute one kind of tax for a tax that the House has proposed, *but may not impose a tax if one had not originally been proposed by the House.*" 3 *Deschler's Precedents of the United States House of Representatives* 314 (1977) (emphasis added).

The government suggests that in *Flint* this Court rejected any comparison between the revenue effects of the original and enacted bills; according to it, "the Court found unpersuasive the argument that the Senate measure . . . was likely to raise total taxes to a greater extent than the proposed House bill." Opp. at 5. The gov-

Fifth Circuit, "[i]n *Flint* [unlike the instant case] interpretation of the terms of the clause was *not* at issue." 772 F.2d at 167, App. at A9 (emphasis added).

By attempting to use *Flint* as support for the Fifth Circuit's decision despite that court's clear language to the contrary, the government ignores both the facts of the former case and the language of the latter.[3]

* * * * *

Unlike the contents of the Fifth Circuit's decision, the substantive arguments of the petition are not misstated by the government in its opposition; instead, they are almost totally ignored. The government characterizes four TEFRA cases from other circuits as "completely dispos[ing] of petitioner's claim for relief." Opp. at 3. Only one of the these cases, however, *Armstrong v. United States*, 759 F.2d 1378 (9th Cir. 1985), contains any considered treatment of TEFRA's validity on the merits; the rest simply dispose of the issue in one or two unsupported sentences.[4]

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ernment's point is gratuitous in light of the above, since there was a House-initiated tax increase *ab initio* in *Flint*—a crucial feature whose *absence* in the case of TEFRA is the crux of the instant litigation. Moreover, the argument itself, for which the government provides no citation, appears nowhere in the body of the *Flint* decision.

[3] What *is* noteworthy about *Flint* is the position taken in that case by the United States. The government there argued that the Court could go *beyond* the Clerk's certification of origination and determine in which chamber the *final*, rather than original, version of an enacted bill was first developed and voted upon. Supplemental Brief for the United States at 5, *Flint*; reprinted in the Appendix to this Reply at 1a, 3a. Under this approach (which the petitioner has not itself advocated) TEFRA would surely be viewed as originating in the Senate, since that chamber was the source of nearly all of the final features of the enacted bill. *See, e.g.*, 772 F.2d at 164-65, App. at A3.

[4] Or they simply cite to other cases which do no better. *See* Pet. at 9 n.5, 24 n.12.

As was pointed out in the petition, there are two major flaws in *Armstrong's* fundamental holding that "the Senate has never regarded itself as being empowered to initiate any sort of revenue bill, even one that lowers taxes" (759 F.2d at 1381)—(1) it is simply wrong as a matter of history, and (2) it is contradicted by the very congressional precedent that it relies on. *See* Pet. at 14-16 (listing over a dozen instances in which the Senate originated bills to repeal or reduce taxes) and at 24 (noting that 2 *Hinds' Precedents of the House of Representatives* § 1489 at 952 (1907), which is cited in *Armstrong*, expressly states that a bill to repeal a tax is *not* a revenue-raising bill and may originate in the Senate; it thus contradicts the very point for which it is cited—namely, "that *all* legislation relating to taxes . . . must be initiated in the House." 759 F.2d at 1381 (emphasis in original)).

These arguments are brushed aside by the government as dealing with "pre-Civil War enactments" whose significance in construing the Constitution pales in comparison to "modern congressional practice." Opp. at 4 n.1. It should be noted first of all that "modern congressional practice" itself does little to validate TEFRA. *See, e.g.*, Pet. at 13-14 (contradictory interpretations of the Origination Clause by the same House Ways and Means Committee Chairman).[5] More importantly, given

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[5] As for the *post*-Civil War Senate-initiated tax measures cited in the petition, the government claims that these are all "incidental provisions in bills intended primarily for other purposes . . . ." Opp. at 4 n.1. The government aspires to be a better judge of congressional purpose than Congress itself; how else could it characterize as *incidental* the tax effects of a Senate-originated act such as Pub. L. No. 82-493, 66 Stat. 518 (S. 2605) (1952) (Pet. at 17 n.8), which Congress itself titled "An Act to amend certain tax laws applicable to the District of Columbia"? This approach well illustrates the observation in *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916), that "it has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue.'" 226 F. at 140.

the vintage of the Constitution itself, reading that document through the historical blinders suggested by the government is singularly inappropriate. *See, e.g., Myers v. United States*, 272 U.S. 52, 174-75 (1926) (actions of the first Congress are entitled to "the greatest weight in the interpretation" of the Constitution).

Most conspicuously absent from the government's brief, as it is absent from all of the decisions on TEFRA, is any hint of what meaning is left to the Origination Clause if this act is upheld. The excerpts from the debates of the Framers presented in the petition clearly indicate that their purpose was to restrain tax increases, not tax reductions. They did so by placing the unwelcome responsibility for originating such measures on the more politically vulnerable chamber of Congress. That purpose is obviously destroyed if the clause is read to permit TEFRA's enactment. It would be one thing if the government had presented some other historical evidence indicating a different intent by the Framers; instead, it utters not one word as to just what that clause might mean under its approach.

If one of the few constitutional limitations on the taxation power is to be rendered meaningless, it should be on the basis of something more persuasive than the silence offered by the government, or the cloak of nonjusticiability set forth in the decision below. For this reason, and for other reasons presented in the petition, a writ of certiorari should issue in this case.

DATED: May 5, 1986.

Respectfully submitted,

RONALD A. ZUMBRUN
SAM KAZMAN *
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Petitioner

* *Counsel of Record*

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1909

No. 407

STELLA P. FLINT, AS GENERAL GUARDIAN OF THE PROPERTY OF SAMUEL N. STONE, JR., A MINOR, APPELLANT,

v.

STONE TRACY COMPANY ET AL.

Appeal from the Circuit Court of the United States for the District of Vermont

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Also fourteen other cases advanced for hearing with the preceding case, viz: Nos. 751, 752, 753, 754, 757, 767, 775, 784, 785, 796, 797, 800, 816, and 819

SUPPLEMENTAL BRIEF FOR
THE UNITED STATES

* * * *

[4] II.

In a true view of the legislative growth of the general revenue measure forming chapter 6 of the enactments of the first session of the Sixty-first Congress, section 38 did not originate in the Senate.

The general history of the matter is as follows:

(*a*) H. R. 1438 was passed by the House without a corporation tax and with an inheritance tax and other provisions which disappeared in the Senate.

(*b*) A form of the corporation tax, importantly different from that finally enacted, was introduced as an amendment in the Senate; and the Senate passed the bill with that and other amendments.

(*c*) The House refused to concur in the Senate amendments to its bill; and that refusal embraced the corporation tax amendment.

(*d*) A conference committee was appointed by each House of Congress, and the conferees finally agreed upon the present form of the corporation tax. The important differences between such tax as approved by the conferees of the Senate and House and the form of the tax originally offered in the Senate will appear from House Document No. 92 of the Sixty-first Congress, first session, pages 402-413 and pages 457-461. The latter pages show the form of the corporation tax section both as finally passed by both Houses and as proposed by the conferees.

[5] (*e*) Section 38 in the new and different form given to it by the conferees was reported to each House by its conferees.

(*f*) The House passed the section as submitted by its conferees.

(*g*) After its passage by the House the present section 38 was passed by the Senate.

It results that, as the present section 38 is vitally different from the section originally proposed in the Senate and as the present form of the section originated with the conferees of the House as well as of the Senate, this corporation tax law did originate in the House. It can properly be said to have originated with its submission to the House by the representatives of that body in the conference. Further, the present form of the section passed the House before it was voted on in the Senate; and it may well be said that a bill originates in that House which first passes it.

III.

Chapter 6 of the acts of the first session of the Sixty-first Congress, containing section 38, is now in the official custody of the Secretary of State; and it bears the usual certificate of the Clerk of the House of Representatives *that the measure originated in that House;* and it is signed by the President of the Senate and Speaker of the House in the usual way; and it bears the signature of the President in approval of the act.

* * * *

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–1262. Decided May 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Texas Association of Concerned Taxpayers challenges the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324 (TEFRA), on the ground that it was enacted in violation of the Origination Clause of the United States Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. Specifically, the petitioner asserts that when the bill originated in the House of Representatives, it was not a "bill for raising revenue" within the meaning of the Origination Clause because the net effect of the bill would have been to reduce the amount of revenue collected.

The United States Court of Appeals for the Fifth Circuit held that this issue was a nonjusticiable political question. 772 F. 2d 163, 165–167 (1985). This holding conflicts with the Ninth Circuit's explicit holding with respect to an identical challenge to TEFRA that the Origination Clause issue was in fact justiciable. See *Armstrong* v. *United States*, 759 F. 2d 1378, 1381–1382 (1985). See also *Wardell* v. *United States*, 757 F. 2d 203 (CA6 1985) *(per curiam)* (adjudicating same claim on the merits); *Heitman* v. *United States*, 753 F. 2d 33 (CA6 1984) *(per curiam)* (same). The Fifth Circuit's holding is also in tension with this Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 142–143 (1911), in which we also adjudicated an Origination Clause challenge to a statute. To resolve this conflict among the circuits, I would grant certiorari.